



## INTERIOR BOARD OF INDIAN APPEALS

Howard Conway v. Billings Area Director, Bureau of Indian Affairs

20 IBIA 29 (05/09/1991)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

HOWARD J. CONWAY

v.

BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-97-A

Decided May 9, 1991

Appeal from the denial of an application for allocation of a range unit on the Blackfeet Reservation.

Affirmed.

1. Indians: Leases and Permits: Farming and Grazing

Under 25 CFR 166.10, the Bureau of Indian Affairs is authorized to implement an approved tribal program for allocation of grazing privileges when the land involved is individually, rather than tribally, owned.

APPEARANCES: Joe J. McKay, Esq., Browning, Montana, for appellant; Joseph A. Gourneau, Acting Billings Area Director, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Howard J. Conway seeks review of an April 20, 1990, decision of the Billings Area Director, Bureau of Indian Affairs (BIA; Area Director), denying an application for allocation of Blackfeet range unit #227. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Pursuant to 25 CFR 166.10, on January 13, 1989, the Blackfeet Tribal Business Council adopted tribal resolution #141-89, establishing a procedure for the allocation of grazing privileges on the reservation. 1/ Section 1 of the resolution

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1/ Section 166.10 provides in pertinent part:

"A tribal governing body may authorize the allocation of grazing privileges without competitive bidding on tribal and tribally controlled Government land to Indian corporations, Indian associations, and adult tribal members of the tribe represented by that governing body. The Superintendent may implement the governing body's allocation program

establish[es] policies and regulations for livestock grazing on the Blackfeet Reservation during the permit period beginning March 10, 1989. The goals of these regulations are to: 1) encourage and protect Blackfeet ranchers and their stock, 2) provide new ranchers with access to the range unit system, and 3) provide some land tenure for ranchers.

Although the copy of resolution #141-89 in the administrative record does not show the written concurrence of the Superintendent of the Blackfeet Agency, BIA, as is required by section 166.10, there is no allegation that such concurrence has not been given.

On April 28, 1989, Edward After Buffalo, an enrolled tribal member, received a grazing permit for range unit #227. Undisputed statements in the filings on appeal indicate that After Buffalo was granted the permit by matching or exceeding the highest bid on the unit in accordance with procedures set forth in resolution #141-89. The permit term began on March 10, 1989, and runs through March 9, 1999. After Buffalo was also allocated range unit #122. On May 22, 1989, After Buffalo applied for and received a pasture authorization for range units #122 and #227, covering the 1989 grazing season. The authorization showed that After Buffalo intended to graze 20 head of his own cattle and 92 pairs owned by William H. Norris of Fort Shaw, Montana. Norris is apparently non-Indian. It further appears that After Buffalo owns an undivided interest in some or all of the allotments included in range unit #227, which is located adjacent to his homesite. 2/

On August 4, 1989, appellant, also an enrolled tribal member, applied for allocation of range unit #227. Appellant stated that he intended to graze 160 cows and 7 bulls on the unit. By letter dated January 8, 1990, the Acting Superintendent of the Blackfeet Indian Agency, BIA, informed appellant that his application had been denied by the Blackfeet Tribal Allocation Committee (BTAC) on the basis of resolution #141-89.

Appellant appealed this letter to the Area Director and filed a statement of reasons in support of his appeal. Appellant argued that he was a qualified applicant for allocation of the range unit and was the only applicant; he was grazing Indian-owned livestock; his situation met the intent of resolution #141-89 because he was seriously engaged in ranching and was trying to develop his operation; and the existing permittee (After Buffalo) had sufficient other pasture for his livestock.

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fn. 1 (continued)

by authorizing the allocation of grazing privileges on individually owned land. The eligibility requirements for allocations shall be prescribed by the governing body, subject to written concurrence of the Superintendent."

2/ According to appellant, range unit #227 is owned partially by individuals and partially by the tribe. No title transcript or other comparable evidence of ownership appears in the administrative record.

The Superintendent forwarded appellant's appeal to the Area Director by memorandum dated January 24, 1990, in which he stated:

The General Grazing Regulations Handbook (55 BIAM Supplement 1 2.12 B (4)) states: "Grazing privileges permitted to a tribal member should not be taken for allocation to another tribal member unless the governing body's allocation policy specifically provides or the governing body and the Superintendent mutually agree to do so." Range Unit #227 is part of Mr. Afterbuffalo's home place where he is engaged in a year-long livestock operation. Mr. Afterbuffalo has sufficient livestock to stock his two range units for a nine month grazing period. For these reasons the Blackfeet Tribal Allocation Committee recommended [appellant's] application to allocate Range Unit #227 be denied.

By letter dated April 20, 1990, the Area Director affirmed the Superintendent's decision, stating at page 3:

Appellant and appellee [After Buffalo] are both Blackfeet Tribal members owning livestock for many years. Resolution #141-89 at II.B.4 states: "Allocation may be made on any unit not grazed by Indian owned livestock." That Indian owned livestock graze the unit has been stated by the appellee; appellant raises the issue of Indian and non-Indian combination grazing on a range unit and, therefore, this mixed ownership grazing on a preference bid unit should make this type of unit singularly allocatable.

However, we also note that within the allocation process itself at II.C.b., less than 100 percent allocatee livestock ownership is acceptable. With none of the known interested parties refuting the apparent latitude of the Allocation Committee (#141-89, II.A) to rule either way on combinative livestock ownership, we believe the Superintendent carried out the Allocation Committee's decision to deny the request for allocation of [range unit] #227, wherein the current permittee is a Blackfeet Tribal member grazing a percentage of Indian owned livestock.

The Board received appellant's notice of appeal from this decision on May 29, 1990. Briefs were filed by appellant and the Area Director. 3/

#### Discussion and Conclusions

Appellant contends that the BTAC incorrectly interpreted and applied resolution #141-89 in this case. He first argues that BIA has an independent trust responsibility to ensure that the BTAC properly follows

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3/ After Buffalo also sent two letters to the Board. These letters are not considered in this decision because they do not show they were served on all interested parties.

resolution #141-89, which he alleges became Federal regulations when the Superintendent concurred in it. Thus, appellant argues that BIA is not bound by clearly erroneous tribal decisions to the extent that such decisions involve individual trust lands and the application of Federal policy, but rather has a legal duty to take correction action to bring the BTAC into compliance with the resolution or to withdraw the individual Indian lands from the allocation process by withdrawing concurrence in the allocation eligibility criteria.

[1] In Redfield v. Billings Area Director, 13 IBIA 356 (1985), the Board considered the effect of a tribal decision under a tribal allocation resolution when the lands involved were solely tribally owned. In that case, the Board held that the allocation determination was a matter for decision by the tribe. In contrast, in LaPlante v. Billings Area Director, 19 IBIA 261 (1991), the Board noted that when the land involved was individually owned, BIA was authorized to implement the tribe's approved allocation program. See 25 CFR 166.10. Therefore, appellant is correct to the extent he argues that BIA is authorized to implement the allocation program on individually owned lands. <sup>4/</sup> In reaching such a decision, BIA can consider a recommendation by the tribal allocation committee.

Appellant states the issue on appeal in two ways. At page 11 of his statement of reasons accompanying his notice of appeal, appellant contends:

If the land is grazed by Indian owned cattle, then [appellant] cannot allocate it. However, if the Unit is not being grazed by Indian owned cattle, then the only question (which does involve the [BTAC's] discretion) is whether [appellant] owned enough cattle to allocate the entire unit or any manageable part thereof.

On page 6 of his opening brief, appellant states the issue as:

Is Blackfeet Range Unit #227 "grazed by Indian owned livestock", as that term is used in the Allocation Resolution (No. 141-89), where the current Indian permittee does not need the unit for his own cattle or operation, where the Indian permittee has already used his own cattle to allocate another range unit with sufficient capacity to graze his own cattle and expand his herd, and where the current permittee has obtained a pasture authorization to graze non-Indian cattle on the unit at issue?

The answer to this question would clearly seem to be in the negative. Resolving this issue does not involve an analysis of tribal discretionary power. It is merely a matter of construing, interpreting and applying a very simple, straight forward regulation to the undisputed facts of the case.

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<sup>4/</sup> BIA would, however, lack authority in this case to allocate any tribal interests in disregard of the BTAC's decision against such allocation. See 25 CFR 166.10; Redfield, *supra*.

Appellant's statement of the issue and all of his remaining arguments are premised upon his apparent belief that he has a right to receive, through allocation, any range unit that is not allocated to another tribal member who has higher priority under the allocation resolution. The resolution provides at II.B.4 that "[a]llocation may be made on any unit not grazed by Indian owned livestock." (Emphasis added.) The resolution does not otherwise mandate the allocation of a range unit that is already held by another tribal member as a bid unit, regardless of the identity of the owner of the livestock grazing on that range unit. The resolution clearly provides and anticipates the exercise of discretion in determining whether or not a particular range unit that is not being grazed by Indian-owned livestock should be allocated. Both the BTAC and BIA exercised this discretion in determining not to allocate range unit #227.

Because of the failure of appellant's basic premise, his specific arguments relating to After Buffalo's use of range unit #227 are not persuasive. After Buffalo was awarded range unit #227 as a bid unit, and is using the unit for a purpose expressly permitted under section III.B of resolution #141-89, which allows the permittee of a bid unit to graze his own and/or anyone else's livestock on the unit.

Appellant also argues that allocating the unit to him is more consistent with Federal and tribal policy than leaving the unit with After Buffalo as a bid unit. The purposes of resolution #141-89 were quoted supra. Both appellant and After Buffalo fall within the scope of these purposes. It is within the discretion of the BTAC and BIA to determine that range unit #227 should not be allocated, but should instead be left with After Buffalo as a bid unit.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 20, 1990, decision of the Billings Area Director is affirmed.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge